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SUBJECT: UNCTAD: Investment for Development

¶1. SUMMARY: UNCTAD experts, numbering approximately 50 member country and 40 field experts, focused on the development dimension of international investment agreements (IIAs) at a recent meeting in Geneva. The experts covered many areas of current debate in the international investment community, including the possible need for more coherence among investment agreements, national security safeguards in agreements, the use of model agreements, investor-State dispute settlement, and how investment agreements promote development. The group decided to reconvene annually. END SUMMARY.

¶2. The United Nations Conference on Trade and Development (UNCTAD) held its first multi-year expert meeting on investment for development, February 10-11, 2009, in Geneva. The US delegation was led by Wes Scholz (Director, Office of Investment Affairs, US State Department), and included Heather Goethert (Financial Economist, Office of Investment Affairs, State Department), Jonathan Kallmer (Deputy Assistant US Trade Representative for Investment) and Ann Low (First Secretary and US Representative to UNCTAD, US Mission, Geneva).

#### Spaghetti bowl of IIAs

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¶3. James Zahn (Officer-in-Charge, Division on Investment and Enterprise, UNCTAD) spoke of the dramatically increased use of IIAs. Zahn introduced the "spaghetti bowl" concept to show the complexity and overlap of the current system. As of the end of 2008 there were 2,628 bilateral investment treaties (BITs) or other investment agreements and 2,806 Double Taxation Treaties (DTTs), with an average of three new IIAs being negotiated each week. An effort to visually present these IIAs by drawing lines between countries with IIAs turns the world map into a spaghetti bowl. Zahn stated that the 'spaghetti bowl' and its inherent complexity have made transparency and consistency across, and among, IIAs much more difficult.

¶4. Zhan's presentation spurred some delegates to press for the launch of an international investment treaty negotiation or to suggest that UNCTAD should develop model measures for investment agreements as a means of improving coherence among agreements. Other delegates, including from Canada and the United States, disagreed and pointed to previous failed attempts to negotiate a global investment agreement, and to the fact that many countries have recently introduced innovative new measures in their agreements. Countries need time to gain experience with, and to

evaluate, these new measures before they will be able to take a position on their value as global model measures. Differences in measures may also represent genuine policy differences between countries that could prevent consensus on model measures. Delegates agreed with Zahn's suggestion that UNCTAD should play a role in facilitating understanding of IIAs and the exchange of best practices concerning IIAs. UNCTAD maintains the world's largest public database of IIAs.

#### National Security Exceptions in IIAs

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15. Delegates discussed the balance between national security safeguards and openness to foreign investment. When negotiating an IIA, countries may exclude certain industries or sectors of their economies from investment by foreigners due to national security considerations. Many developing countries at the meeting, as well as Canada, expressed concern about these "national security exceptions" as potentially protectionist measures on the part of developed nations. Karl Sauvant (Executive Director of the Vale Columbia Center on Sustainable International Investment) defended the use of such exceptions, stating that FDI is not always beneficial to certain industries[L1]. Sauvant stated that FDI to developing countries declined 20 percent in 2008, and he expected a further 30 percent decline in 2009. He suggested that UNCTAD could play a monitoring role to keep track of potentially protectionist measures that countries may take in the wake of the global financial crisis. Russia stated that many of its key industries are protected from FDI not only for security reasons but also to protect strategic domestic[L2] industries.

#### MODELS FOR BITS: PROs and CONs

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16. The delegate from the Ghana Investment Promotion Centre stated that Ghana has four templates or models for BITS: an Asian model, a North American model, a European model and a developing country model. The Ghana representative said that this four-model approach [L3]has worked well for Ghana, allowing Ghana to negotiate 23 BITS. Other developing countries praised the virtues of templates or models for negotiating BITS since standardization would facilitate negotiations and [L4]ensure consistency and transparency among BITS in the international system.

17. Developed countries, led by an intervention from Germany, warned that attempting to standardize BITS or to have a one-model approach did not offer sufficient flexibility for negotiating partners to adjust for the needs of different countries, and that a one-model approach could encroach on a state's sovereignty if the provisions in that model conflicted with that state's domestic policies. Cynthia Wallace (Consultant, Former Senior Adviser to the Executive Director, United Nations Economic Commission for Europe) added that variation in BITS is healthy for development as it allows for flexibility. Mr. Masa Sugano (Deputy Director, Economic Partnership Division, Trade Policy Bureau) from Japan offered that consistency could be achieved by creating IIAs with regional partners, then extrapolating those agreements to international partners. Brazil also opposed the idea of creating global model measures for investment agreements.

#### INTERNATIONAL ARBITRATION AND INVESTOR-STATE DISPUTES

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18. The discussion on investor-State dispute settlement (ISDS) was wide-ranging, represented many different viewpoints, and constituted a major focus of the two-day meeting. The delegations of Ecuador, Venezuela, Argentina, and Zimbabwe said that due to the complexity of BITS, arbitration was perceived to be unfair to developing countries that have few resources to devote to legal arbitration cases. Bernard Bishop (Professor of Law, Griffith University, Australia) countered by citing 300 cases involving BITS being judged 50 percent in favor of the state and 50 percent in favor of the investor,[L5] and he asserted that the settlements are fair. The cases pending against Ecuador at the International Centre for Settlement of Investment Disputes (ICSID) were tried in absentee, which the delegate from Ecuador said was not fair[L6]. The delegate from Ecuador stated that Ecuador has notified its intent to bar investment agreements relating to natural resources from arbitration[G7] by ICSID. Andrea Saldarriaga[L8] (International

Legal Consultant, NY, USA) proposed returning to basic international law principles instead of arbitration and judging cases based on the individual circumstances, not on similar jurisprudence, as a possible solution to the perceived problems in ISDS arbitration. Walid Hamida (Matre de Conférences, Université d'Evry Val-d'Essonne et Sciences Po, Paris, France) countered Ms. Saldarriaga's point, stating that jurisprudence was not an issue, since historically investor-State dispute settlement judgments have been equally divided between those in favor of the investor and those in favor of the State. Luis Alberto Gonzales Garcia (Legal Advisor, Matrix Chambers, London) strongly urged member countries to update their list of qualified arbitrators[L9].

¶9. Brazil argued that a strong domestic judicial system is imperative to avoid taking investor-State disputes to international arbitration. China also criticized the arbitration method, stating that countries have different legal systems and should find common legal ground for investor-State dispute settlement. The United States delegate voiced support for UNCTAD to consider work to help countries develop strategies to avoid investor-State disputes and for managing the risks of disputes that do arise.

#### BRAZIL OPPOSED TO IIAS

¶10. Brazil is not a party to any IIA and criticized the current "spaghetti bowl" of IIAs as discouraging development. The delegate from Brazil [L10] said that Brazil has experienced increased GDP over the last 40 years without being a party to any BITs.[L11] Brazil, supported by Finland, stated that an investor must have a strong reason to invest in a country, and if the judicial system is reliable and transparent, no BITs are necessary to encourage investment. Brazil recommended experimenting with methods other than BITs for IIAs.[L12]

#### INVESTMENT PROMOTION

¶11. Meeting participants debated the link between investment promotion and IIAs. Germany stated that the goals of a BIT should be explicitly defined in the BIT, including any development objectives. The US recognized activities to promote development as important, but added that the fundamental purpose of a BIT is to encourage investment. Development may be an offshoot of that FDI, but we should not complicate and confuse the IIA by attempting to make development programs the primary purpose of IIAs. The delegate from Ghana agreed that the primary purpose of an IIA must be to facilitate investment. However, he said that by linking investment promotion with Ghana's IIAs, he hoped to turn the IIA into a living document that actually attracted new investment. The European Community opined that investment is fundamentally for development. The representative from Finland stated that the role of investment agreements is to promote investment by private businesses by creating a positive investment climate between the signatories. While increased investment may result in economic development, it is not the primary purpose of the investment agreement.

#### STORELLA #

[L1]How does this relate to the use of nse? Is sauvant suggesting that the definition of NSE be extended beyond national security considerations to social considerations, making a value judgement on whether the DFI is beneficial? It doesn't make sense to me that these two thoughts are connected, or if they remain connected, you need to add more of an explanation.

[L2]Was this a so general or limited to "strategic" domestic industry or someother qualifier?

[L3]You need to define this. Then make the comment about it.

[L4]You need to define this? Why is a one-model approach similar to a four-model approach? This is confusing.

[L5]What does this fact tell us?

[L6] Put this sentence before prior one since it explains why Ecuador will not accept arbitration

[G7]I've changed this to reflect what Ecuador has actually done--I do not have notes on what the delegate said, but I think he may have gone further that what Ecuador's policy actually is--no need to record that in a cable as what they have actually done makes the point.

[L8]Title and country?

[L9]Zach, are ISDS arbitration cases all done under a single law?  
For example, in finance, disputes over bond payments tend to all  
fall under ny state jurisdiction for settlement. Was part of the  
arbitration issue that developing countries don't like referring  
cases to be judged according to US law?

[L10]Same issue as with Ecuador..above

[L11]This is confusing. Is Brazil saying BITS are good and it has  
used them successfully over the past 40 years or that IIAs are bad?  
Is Brazil party to BITs? How many?

[L12]Rewrite para so Brazil's position is clear.